



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of  
Market Oversight

CFTC Letter No. 12-51

No-Action

December 14, 2012

Division of Market Oversight

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### **Clarification of Division of Market Oversight No-Action Letter 12-04 (July 17, 2012), and Extension of No-Action Relief for Non-Clearing Member Swap Dealers from Large Swap Trader Reporting Requirements of Section 20.4 of the Commission's Regulations**

Dear Mr. Pantano:

By letter dated December 6, 2012, to the Division of Market Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission”), and pursuant to Section 140.99 of the Commission’s regulations, you request on behalf of your client, the Futures Industry Association (“FIA”), clarification of the timeline, as contemplated pursuant to a no-action letter issued by the Division on July 17, 2012 (the “No-Action Letter”),<sup>1</sup> within which swap dealers that are not clearing members (“non-clearing member swap dealers”) must come into compliance with the large swap trader reporting requirements of Part 20 of the Commission’s regulations. You request this clarification in light of Commission staff guidance issued subsequent to the issuance of the No-Action Letter,<sup>2</sup> regarding Section 1.3(ggg)(4) of the Commission’s regulations (the “de minimis exception”).<sup>3</sup>

The Division is issuing this letter to clarify the compliance timeline contemplated by the No-Action Letter, and to extend the reporting relief provided to non-clearing member swap dealers in the No-Action Letter. The extended no-action relief is provided to non-clearing member swap dealers regardless of whether they are members of FIA.

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<sup>1</sup> “Staff No-Action Relief: Temporary Relief for Non-Clearing Member Swap Dealers from the Requirements of § 20.4 of the Commission’s Regulations Regarding Large Swaps Trader Reporting for Physical Commodities,” Division No-Action Letter 12-04 (July 17, 2012).

<sup>2</sup> “CFTC Staff Responds to Questions on Timing of Swap Dealer Registration Rules,” Commission Press Release 6348-12 (September 10, 2012), available at <http://www.cftc.gov/PressRoom/PressReleases/pr6348-12>.

<sup>3</sup> 77 Fed. Reg. 30596, 30744-45 (May 23, 2012).

## **BACKGROUND**

### **The No-Action Letter**

On July 22, 2011, the Commission published large trader reporting rules for physical commodity swaps and swaptions.<sup>4</sup> The reporting rules are codified in Part 20 of the Commission's regulations and became effective on September 20, 2011. Section 20.3 of the rules requires daily reports from clearing organizations. Section 20.4 of the rules requires daily reports from clearing members and swap dealers. As of July 2, 2012, clearing organizations and clearing members were required to be in full compliance with Part 20.<sup>5</sup>

Section 20.10(b) provides that non-clearing member swap dealers are required to comply with Part 20 upon the effective date of final regulations further defining the term swap dealer. These final regulations were adopted by the Commission with an effective date of July 23, 2012.<sup>6</sup> Market participants raised concerns that this compliance date would require entities to begin reporting under Part 20 before they were required to register as swap dealers, since, as July 23, 2012 approached, regulations impacting the timeline for swap dealer registration were still in the process of being finalized.<sup>7</sup> Market participants submitted that modifying the compliance date for Part 20 reporting by non-clearing member swap dealers would enable entities first to confirm their regulatory status as swap dealers, before working to comply with the Part 20 reporting requirements applicable to non-clearing member swap dealers.

On July 17, 2012, the Division issued the No-Action Letter, which provided non-clearing member swap dealers with relief from the reporting requirements of Part 20 until 60 days after the "swap dealer registration application date". The No-Action Letter provided non-clearing

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<sup>4</sup> 76 Fed. Reg. 43851 (July 22, 2011).

<sup>5</sup> On September 16, 2011, the Division issued a letter under Section 20.10(c) to relieve clearing organizations and clearing members as a class from the reporting requirements of Sections 20.3 and 20.4 until November 21, 2011 for cleared swaps, and January 20, 2012 for uncleared swaps. On November 18, 2011, the Division issued a second letter under Section 20.10(c) to establish a conditional safe harbor for less than fully compliant reporting under Sections 20.3 and 20.4 until March 20, 2012. On March 20, 2012, the Division issued conditional no-action relief for less than fully compliant reporting under Sections 20.3 and 20.4 until July 2, 2012. In each case, relief was conditioned on the submission of month-end open interest reports to the Division during the relief period. Both the safe harbor and the no-action relief for less than fully compliant reporting were also conditioned on the making of a good faith attempt to comply with the requirements of Part 20 (with direction from the Division as to what would demonstrate good faith), and the submission of an e-mail to the Division describing how submitted reports varied from fully compliant reports, the arrangements being made to reach full compliance, and the anticipated date of full compliance. On July 2, 2012, the Division issued conditional no-action relief to clearing members, until July 27, 2012, for less than fully compliant reporting under Section 20.4 of positions based on ownership. Relief was conditioned on the submission to the Commission, by July 30, 2012, of fully compliant ownership reports dating back to July 2, 2012.

<sup>6</sup> 77 Fed. Reg. 30596 (May 23, 2012).

<sup>7</sup> See, e.g. the Commission's regulations further defining the term swap, which were adopted by the Commission on August 12, 2012, with an effective date of October 12, 2012. 77 Fed. Reg. 48208 (August 13, 2012).

member swap dealers satisfying the conditions of Section 20.10(e) (“Section 20.10(e) swap dealers”)<sup>8</sup> with an additional six calendar months of reporting relief.

The relief periods established by the No-Action Letter were to be calculated with reference to the “swap dealer registration application date”. The No-Action Letter defined the “swap dealer registration application date” as “the date by which each person who is a swap dealer must apply to be registered as a swap dealer,” pursuant to Section 3.10(a)(1)(v)(C)(2) of the Commission’s regulations.<sup>9</sup> Pursuant to Section 3.10(a)(1)(v)(C)(2) of the Commission’s regulations, each person who is a swap dealer on the effective date of final regulations further defining the term swap must apply to be registered as a swap dealer by that date.<sup>10</sup>

The No-Action Letter thus contemplated that the “swap dealer registration application date,” from which the reporting relief periods provided to non-clearing member swap dealers would be calculated, would be the effective date of final regulations further defining the term swap. These final regulations were adopted by the Commission with an effective date of October 12, 2012.<sup>11</sup>

### **The De Minimis Exception**

On September 10, 2012, Commission staff issued guidance that clarified the effect of the de minimis exception on the determination of swap dealer status.<sup>12</sup> Pursuant to the de minimis exception, an entity that is not registered as a swap dealer will not be deemed to be a swap dealer until its swap dealing activities have exceeded, in the aggregate, one of two prescribed gross notional amount thresholds (the “notional thresholds”).<sup>13</sup> Once an entity’s swap dealing

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<sup>8</sup> Section 20.10(e) provides the Commission with discretion to extend the Section 20.10(b) compliance date “by an additional six calendar months based on resource limitations or lack of experience in reporting to the Commission for a swap dealer that is not an affiliate of a bank holding company and:

- (1) Is not registered with the Commission as a futures commission merchant and is not an affiliate of a futures commission merchant;
- (2) Is not registered with the Securities and Exchange Commission as a broker or dealer and is not an affiliate of a broker or dealer; and
- (3) Is not supervised by any Federal prudential regulator.”

While the criteria for relying on the additional six calendar months of reporting relief provided by the No-Action Letter reflected the criteria set forth in Section 20.10(e), the relief provided by the No-Action Letter was provided pursuant to a no-action position taken by the Division, rather than pursuant to an exercise of the discretionary authority granted to the Commission in Section 20.10(e).

<sup>9</sup> See *supra* note 1 at footnote 2.

<sup>10</sup> 77 Fed. Reg. 2613, 2626 (January 19, 2012).

<sup>11</sup> See *supra* note 7.

<sup>12</sup> See *supra* note 2.

<sup>13</sup> As of October 12, 2012, the notional thresholds are: (1) \$8 billion (which is a phase-in level that will subsequently be adjusted in accordance with Section 1.3(ggg)(4) of the Commission’s regulations); and (2) \$25 million with regard to swaps in respect of which the counterparty is a “special entity” as defined in Section 4s(h)(2)(C) of the Commodity Exchange Act and Section 23.401(c) of the Commission’s regulations. These thresholds consider all swap positions connected with the swap dealing activities of the entity, or any other entity controlling, controlled by or under common control with such entity. See *supra* note 3. With regard to the “special entity” notional threshold,

activities exceed either of the notional thresholds, the entity will be deemed to be a swap dealer on the earlier of: (i) the date on which the entity submits a complete application for registration as a swap dealer, or (ii) the date that is two months after the end of the month in which the notional threshold is exceeded, on which date the entity will be required, pursuant to Section 23.21(a) of the Commission’s regulations, to apply to be registered as a swap dealer.<sup>14</sup> The date described in clause (ii) is therefore referred to herein as the “swap dealer registration deadline”.

For the first year after the regulatory framework for swaps and swap dealers comes into effect, the swap positions that will be relevant in determining whether an entity’s swap dealing activities have exceeded one of the notional thresholds will be the swap positions entered into by the entity – and by any entity controlling, controlled by or under common control with the entity – after October 12, 2012.<sup>15</sup> Thus, the earliest date on which an entity could have exceeded one of the notional thresholds was October 13, 2012. Such an entity will, at the latest, be deemed to be a swap dealer, and will be required to apply to be registered as such, on December 31, 2012 – the entity’s swap dealer registration deadline – although the entity could elect to apply for registration, and thereby become a swap dealer, at an earlier date.

## **CLARIFICATION AND NO-ACTION RELIEF**

The Commission staff guidance regarding the de minimis exception clarified that the deadline by which any particular entity is required to apply for registration as a swap dealer is tied to when that entity’s swap dealing activities exceed one of the notional thresholds. The Commission staff guidance also clarified that the earliest deadline by which any entity will be required to apply for registration as a swap dealer will be December 31, 2012.

In light of the Commission staff guidance regarding the de minimis exception, you have requested, on behalf of your client FIA, clarification of the timeline within which non-clearing member swap dealers must come into compliance with their reporting obligations under Part 20. Specifically, you have requested confirmation that, taking into account the clarified effect of the de minimis exception, the No-Action Letter can be interpreted as providing reporting relief periods that are to be calculated, with respect to any particular entity, from the date upon which

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the Commission’s Division of Swap Dealer and Intermediary Oversight (“DSIO”) issued a staff no-action letter on October 12, 2012 that provided relief from such notional threshold for certain transactions in utility commodity swaps by certain non-financial entities. See “Staff No-Action Relief: Temporary Relief from the De Minimis Threshold for Certain Swaps with Special Entities”, DSIO No-Action Letter 12-18 (October 12, 2012).

<sup>14</sup> See 77 Fed. Reg. 2613, 2629 (January 19, 2012).

<sup>15</sup> See *supra* note 3. The Division notes that interpretive guidance and no-action relief has recently been issued by Commission staff that relates to the determination of when an entity’s swap dealing activities exceed one of the notional thresholds. See, e.g. “Time-Limited No-Action Relief: Cleared Swaps in Agricultural and Exempt Commodities and Swaps Exchanged for Futures Not to be Considered in Calculating Aggregate Gross Notional Amount for Purposes of Swap Dealer De Minimis Exception”, DSIO No-Action Letter 12-16 (October 12, 2012); “Time-Limited No-Action Relief: Swaps in Agricultural and Exempt Commodities Not to be Considered in Calculating Aggregate Gross Notional Amount for Purposes of Swap Dealer De Minimis Exception and Calculation of Whether a Person is a Major Swap Participant,” DSIO No-Action Letter 12-20 (October 12, 2012); “Frequently Asked Questions (FAQ) – Division of Swap Dealer and Intermediary Oversight (“DSIO”) Responds to FAQs About Swap Entities” (October 12, 2012), each available on the Commission’s website at [www.cftc.gov](http://www.cftc.gov).

the entity applies for registration as a swap dealer after its swap dealing activities have exceeded one of the notional thresholds.

As discussed above, the No-Action Letter contemplated that the “swap dealer registration application date,” from which the reporting relief periods provided to non-clearing member swap dealers would be calculated, would, pursuant to Section 3.10(a)(1)(v)(C)(2) of the Commission’s regulations, be the effective date of final regulations further defining the term swap. These final regulations were adopted by the Commission with an effective date of October 12, 2012.

Calculated from this date, the 60 day period of reporting relief provided by the No-Action Letter would have extended until December 11, 2012,<sup>16</sup> and the additional six months of reporting relief provided to Section 20.10(e) swap dealers would have extended until June 11, 2013.

The Division acknowledges, however, that taking into account the clarified effect of the de minimis exception, the 60 day period of reporting relief provided by the No-Action Letter expired before the earliest deadline – on December 31, 2012 – by which any entity is required to apply for registration as, and thereby become subject to the regulatory obligations of, a swap dealer. The Division notes further that, prior to the issuance of this letter, and as demonstrated by the request for clarification that you submitted to the Division on December 6, 2012, there has been some uncertainty among prospective swap dealers regarding the timeline within which they must come into compliance with their Part 20 reporting obligations. The Division therefore believes that it is appropriate to make available to prospective swap dealers with upcoming swap dealer registration deadlines an additional period of time to come into compliance with the reporting requirements of Part 20.

Accordingly, the Division will not recommend that the Commission commence an enforcement action against a non-clearing member swap dealer for failure to submit Section 20.4 reports for the period from December 11, 2012 until **March 1, 2013**. Any entity that is relying on this no-action relief must state that it is doing so in an e-mail to the Division at [SwapsLTR@cftc.gov](mailto:SwapsLTR@cftc.gov), by no later than the date on which the entity applies for swap dealer registration.

Subject to the additional relief available to Section 20.10(e) swap dealers discussed below, on and after March 1, 2013, an entity will be required to be in compliance with the reporting requirements of Part 20 by the date that the entity becomes a swap dealer. As discussed above, taking into account the de minimis exception, an entity will become a swap dealer on the earlier of: (i) the date upon which the entity applies for registration as a swap dealer, or (ii) the entity’s swap dealer registration deadline, which will be two months after the end of the month in which the entity’s swap dealing activities exceed one of the notional thresholds. The effect of the de minimis exception is to make available a period of at least two months, after an entity has determined that its swap dealing activities have exceeded one of the notional thresholds, for the

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<sup>16</sup> Upon the expiration of the reporting relief period, and subject to the additional relief available to Section 20.10(e) swap dealers, an entity would be required to be in compliance with the reporting requirements of Part 20 upon becoming a swap dealer. Taking into account the clarified effect of the de minimis exception, the only entities that will have become swap dealers prior to the earliest swap dealer registration deadline of December 31, 2012 will be entities that have elected to apply for swap dealer registration prior to their swap dealer registration deadline. The extended no-action relief provided herein is intended to include retroactive reporting relief from Part 20 for any entity that became a swap dealer between December 11, 2012 and the date of issuance of this letter.

entity to apply for registration as, and thereby become subject to, the regulatory obligations of a swap dealer, including the reporting requirements of Part 20. As reflected by the 60 day relief period provided in the No-Action Letter, the Division believes that the de minimis exception makes available an adequate amount of time, after an entity has confirmed its prospective regulatory status as a swap dealer, for the entity to come into compliance with the reporting requirements of Part 20.

The Division will not recommend that the Commission commence an enforcement action against a Section 20.10(e) swap dealer for failure to submit Section 20.4 reports until **September 1, 2013**. Thus, an entity that becomes a swap dealer before September 1, 2013, and that satisfies the conditions of Section 20.10(e), will have until September 1, 2013, at the latest, to comply with the reporting requirements of Part 20. An entity that is relying on this additional period of reporting relief must submit an e-mail to the Division at [SwapsLTR@cftc.gov](mailto:SwapsLTR@cftc.gov), no later than the date that the entity applies for registration as a swap dealer, certifying that it meets the conditions of Section 20.10(e), including the resource limitation or lack of reporting experience requirement, and describing with specificity: (1) the resource limitations or lack of experience in reporting transactions to the Commission that cause the entity to be unable to submit fully compliant reports upon becoming a swap dealer, (2) the arrangements that are being made for submitting fully compliant reports, and (3) the anticipated date of full compliance with the requirements of Part 20 as prescribed by the Division.

The additional relief period for Section 20.10(e) swap dealers extends until September 1, 2013. On and after September 1, 2013, any entity, including an entity that satisfies the conditions of Section 20.10(e), will be required to be in compliance with the reporting requirements of Part 20 by the date upon which the entity becomes a swap dealer, which, as discussed above, will be the earlier of: (i) the date upon which the entity applies for registration as a swap dealer, or (ii) the entity's swap dealer registration deadline. An entity that anticipates not being able to submit fully compliant reports by the date upon which it becomes a swap dealer would not, however, be foreclosed from seeking discretionary relief from the Division.<sup>17</sup>

The Division encourages entities that anticipate becoming swap dealers to review the Part 20 reporting guidebook – available on the Commission's website – that has been developed by the Division in consultation with the Office of Data and Technology.<sup>18</sup> The Division also encourages entities that anticipate becoming swap dealers to begin submitting Section 20.4 reports in advance of their Part 20 compliance deadline. This will allow such entities to engage with Commission staff to correct any reporting errors, thereby facilitating such entities' ability to submit fully compliant reports by the time that they are required to do so.

The Division reminds the public that other applicable provisions of Part 20, including the special call provision of Section 20.5(b) and the books and records requirements of Section 20.6, became effective on September 20, 2011.

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<sup>17</sup> See Section 140.99 of the Commission's regulations. 17 C.F.R. § 140.99.

<sup>18</sup> See <http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/XXXII.LargeSwapsTraderReporting/index.htm>.

The no-action relief provided herein contains a collection of information, as that term is defined in the Paperwork Reduction Act.<sup>19</sup> Therefore, a control number for the collection must be obtained from the Office of Management and Budget (“OMB”). In accordance with 44 U.S.C. § 3507(d) and 5 C.F.R. §§ 1320.8 and 1320.10, the Division will, by separate action, prepare an information collection request for review and approval by OMB, and will publish in the Federal Register a notice and request for public comments on the collection burdens associated with the no-action relief. If approved, a non-clearing member swap dealer may not rely on the Division’s determination not to recommend an enforcement action to the Commission unless the non-clearing member swap dealer provides the information that the Division has determined is essential to the provision of no-action relief.

This letter, and the no-action position taken herein, represent the views of the Division only, and do not necessarily represent the position or views of the Commission or of any other division or office of the Commission’s staff. The no-action position taken herein does not excuse affected persons from compliance with any other applicable requirements of the Commodity Exchange Act or the Commission’s regulations thereunder. As with all no-action letters, the Division retains the authority to condition further, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

If you have any questions regarding the content of this letter, please contact Nora Flood at nflood@cftc.gov or (202) 418-5354.

Sincerely,

Richard A. Shilts  
Acting Director  
Division of Market Oversight

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<sup>19</sup> 44 U.S.C. §§ 3501 *et. seq.*